United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

ORIGINAL

76-2139

T-6601 -76-2139
To be argued by
STEPHEN FLAMHAFT

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
Docket No. T-6601
76-2139

CHARLES PETERS

Appellant,

-against-

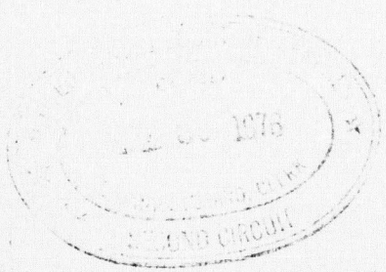
UNITED STATES OF AMERICA,

Appellee.

On Appeal from the United States
District Court for the Eastern
District of New York

BRIEF FOR APPELLANT

STEPHEN FLAMHAFT
32 Court Street
Brooklyn, New York 11201



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RULES

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-against-

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BRIEF FOR APPELLANT

PRELIMINARY STATEMENT

Charles Peters appeals from a denial, after hearing, of a petition brought under Title 28, United States Code, Section 2255 to vacate a sentence imposed upon him in the United States District Court for the Eastern District of New York (Platt, J.).

Appellant had originally entered a plea of guilty to Count One of Indictment 75 (R 275 which charged him with the use of a firearm in the commission of a felony under Title 18, U.S.C. §924(c)(1)(2). On November 21, 1975, appellant was sentenced by the Honorable Thomas C. Platt to a term of imprisonment of eight years to run consecutively to a State sentence of seven years

incarceration.

Appellant sought to belatedly appeal this sentence by filing a petition under Section 2255 alleging that his right to appeal his sentence was frustrated. After hearing, the petition was denied.

On appeal, appellant argues as error the denial of the petition to vacate the sentence on the grounds that the District Court in determining frustration of right failed to consider (1) appellant's claim of ignorance of his right to appeal a sentence and (2) assigned counsel's failure to so advise.

STATEMENT OF FACTS

On September 23, 1975, appellant, together with co-defendants Gerard Collins and Paul Flammia, entered a plea of guilty to Count One of Indictment 75 CR 275, which charged each of them with the use of a firearm during the commission of a felony under Title 18, U.S.C. §924(c)(1)(2). On November 21, 1975, appellant was sentenced to a term of imprisonment of eight years to run consecutively to a State sentence of seven years. At his plea and sentencing, appellant was represented by assigned counsel Thomas O'Brien, Esq., while co-defendant Collins was represented by John Corbett, Esq., and Flammia by George Scheinberg, Esq., both of whom were assigned.

On the date of sentencing and immediately thereafter, Flammia, Collins and appellant met in the holding pen outside

the courtroom (T. 9-11, 61)[1]. In front of the holding pen a few feet away were attorneys Corbett and Scheinberg. (T. 11, 43, 66, 69.) At this time, in the presence of appellant and Flammia, Collins told his attorney of his disturbance due to the severity of this consecutive sentence. (T. 11-12, 53.) Collins felt that he had been unjustly sentenced because of the Court's statements that it "knew all the gory details" of the crime brought out during the trial of other co-defendants, a trial in which Collins had not participated. (T. 12, 30, 53.) According to Collins, his attorney advised that he could not appeal his sentence after a plea of guilty but could merely apply for a reduction of sentence under F.R.Cr. P 35. (T. 12, 53, 63.) According to John Corbett, no mention was made of appealing the sentence, but only of the Rule 35 motion. (T. 44-45.)

Shortly after these statements, appellant directly apoke with John Corbett awaiting the arrival of his attorney, Thomas O'Brien. (T. 13, 53-54.) When Mr. O'Brien entered the holding area, appellant also complained to him that he was being penalized for the details developed at the trial of the other co-defendants. Mr. O'Brien then replied that "it's unfortunate ... but there is nothing we can do about it". (T. 50.) At this point appellant asked his attorney about the possibility for a reduction in sentence. Counsel replied that he did not

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1. "T" refers to pages of the transcript of the Section 2255 hearing held on October 8, 1976 before Judge Platt.

believe that a reduction was likely but that he would file such a motion if so requested. (T. 50.) Relying on Mr. Corbett's statements, appellant did not ask his own attorney about his right to appeal the sentence, nor did his attorney inform him of this. (T. 55).

Appellant filed a motion for a reduction of sentence under F.R.Cr.P. 35, which motion was denied by "Memornadum and Order" dated February 26, 1976. No notice of appeal had been filed. By petition entitled "Notice of Motion for Permission to Appeal Belatedly" dated March 16, 1976, brought under Title 28, U.S.C. §2255, appellant sought to vacate the sentence in order to allow this Circuit Court to review the conditions under which appellant was sentenced and the District Court's rationale in doing so.

The basis for this request was not merely the erroneous advice of co-defendant's assigned counsel but also the "failure (of assigned counsel) to advise (appellant) of his lawful and constitutional right to (a)ppeal" his sentence within the proper time period. See "Notice of Motion for Permission to Appeal Belatedly" at

Due to the similarity of issues developed in the petitions of appellant, Collins and Flammia, Judge Platt consolidated the cases and held a consolidated hearing on October 8, 1976.

After hearing, the District Court denied the petitions

of all three on the grounds that Collins' assigned counsel did not render ineffective assistance to his client, and that appellant could not claim frustration due to the advice of another man's attorney. (T. 77-80.) Appellant now seeks to appeal this denial in order to file at a future date a belated notice of appeal to contest the constitutionality of the imposition of sentence.

ARGUMENT

THE FAILURE OF ASSIGNED COUNSEL TO ADVISE APPELLANT OF HIS APPELLATE REMEDIES DEPRIVED HIM OF HIS RIGHT TO FILE A TIMELY NOTICE OF APPEAL.

Appellant argues as error the failure of the District Court to consider appellant's ignorance of his appellate remedies or assigned counsel's lack of such remedies when the Court denied the petition to vacate sentence.

When a notice of appeal is not filed within the ten day limit prescribed in Federal Rules of Appellate Procedure 4 (b), a criminal defendant may petition the U.S. District Court under Title 28, U.S.C. 2255 to vacate sentence to provide him with the opportunity to appeal. Rodriguez v. United States, 350 F. 2d 732, 733 (D.C. Cir. 1965); Kent v. United States, 423 F. 2d, 1050 (5th Cir. 1970). When this is done, the petitioner must show some simple deprivation or frustration of his right to appeal; i.e., he does not have to show any likelihood of success or

that his appellate claim would not result in harmless error. Rodriguez v. United States, 395 U.S. at 330; United States ex rel. Williams v. LaVallee, 487 F. 2d 1006, 1010 (2d Cir. 1973), cert. denied, 416 U.S. 916 (1974); United States ex rel. Randazzo v. Follette, 444F. 2d 625 (2d Cir.), cert. denied, 404 U.S. 916 (1971). In reviewing a petition for relief under Section 2255, the District Court should take into account the fact that petitioners very often lack the language facility to even allege a summary statement of points for appeal and are usually totally ignorant of legal arguments that may justify an appeal. Rodriguez v. United States, supra, 395 U.S. at 330.

Here, the appellant clearly demonstrated that his right to appeal his sentence was frustrated by his lack of knowledge of the existence of this right and by assigned counsel's failure to advise him of this remedy even when appellant loudly complained of the conditions under which his sentence was imposed. The Court ignored this frustration due to appellant's lack of knowledge, however, by its "Memorandum and Order" which limited the Section 2255 hearing to a determination of the existence of erroneous advice by counsel or of other acts constituting "ineffective assistance" of counsel. See "Memorandum and Order" dated August 16, 1976 at 10. The same "Memorandum and Order" cites cases in which either a retained[1] or assigned[2]

1. United States ex rel. Randazzo v. Follette, 444 F. 2d 625, 629 (2d Cir.), cert. denied, 404 U.S. 916 (1971).
2. Kent v. United States, 410 F. 2d 122 (6th Cir. 1969). Cartwright v. United States, 410 F. 2d 112 (6th Cir. 1969)

failed to properly prosecute an appeal when a request to do so was given by the defendant.

While such positive evidence of an attorney's malfeasance can substantiate a claim of frustration, such evidence is not the only way in which a right to appeal may be improperly denied. Indeed, beyond the active impropriety of an attorney, the mere failure to advise a client of the right to appeal after trial has been held to be sufficient evidence of deprivation of appellate rights. United States ex rel. Smith v. McMann, 417 F. 2d 648, 654 (2d Cir. 1969), cert. denied, 397 U.S. 925 (1970); Jenkins v. United States, 399 F. 2d 981 (D.C. Cir. 1968). While former decisions thought it relevant to inquire into defendant's intent to appeal or into a defendant's request of counsel to appeal, Smith found that a defendant's ignorance of his appellate rights makes such an inquiry meaningless in determining a frustration of an appeal. United States ex rel Smith v. McMann, supra, 417 F. 2d at 654-655 and cases cited therein. Thus, the Smith court sustained the claim of frustration when an indigent defendant was either not advised of his right to appeal by his counsel or otherwise lacked knowledge about this right. Id. at 655. Here, the District Court after hearing, continued to ignore appellant's argument. The petition was denied after a finding that Collins' attorney did not render erroneous advice. (T. 77-80.) When appellant's attorney at the hearing stressed Peters' total lack of knowledge of the appellate remedy, the District

Court continued to aver that appellant's claim should be denied because he should not have relied on co-defendant's attorney, even if this attorney did give erroneous advice. (T. 77-80.) Whether appellant's reliance on another attorney was intelligent or not and whether this man's advice was erroneous or not is not really the crux of appellant's argument. Appellant's right to a review of his sentence was rendered meaningless by the failure to be properly advised by counsel.

Undoubtedly, the government will seek to draw a distinction between an inquiry into a deprivation of a right to appeal after trial, and into a deprivation of a right to appeal after guilty plea.[1] Such a distinction is meaningless. The Due Process Clause guarantees the constitional right to be free from an arbitrarily imposed sentence. See United States v. Tucker, 404 U.S. 443 (1972); Townsend v. Burke, 334 U.S. 736 (1948).

The existence of a constitutional right presupposes the right to appellate review of a claimed violation of that

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1. F.R.Cr.P. 32(a)(2) draws a distinction between the Court's duty to advise of appeal after a conviction based upon a trial and one based upon a guilty plea. The 1975 Committee notes to Rule 32, however, refers to cases in which a collateral attack on the merits was brought after a voluntary guilty plea, and not an attack on the sentencing process. See, Crow v. United States, 394 F. 2d 284 (10th Cir. 1968); Burton v. United States, 307 F. Supp. 448 (D. Ariz. 1070); Alaway v. United States, 280 F. Supp. 326 (D. Cal. 1968). Thus the distinction drawn in Rule 32(a)(2) has no value in determining the Rule to be applied in reviewing claims of frustration of an appeal of a sentence.

right absent a showing that appellant "intentionally relinquished or abandoned a known right" to appeal. Johnson v. Zerbst, 304 U.S. 458, 464 (1938); Fay v. Noia, 372 U.S. 391, 439 (1963). The right to challenge the imposition of a sentence on appeal has never been abrogated because the conviction was based upon a plea of guilty and not a verdict at trial. See, e.g., United States v. Schwartz, 500 F. 2d 1350 (2d Cir. 1974); United States v. Driscoll, 496 F. 2d 252 (2d Cir. 1974).

Here, appellant put forth affirmative evidence that he had no knowledge of his appellate right and that no mention was made to him of his right to challenge his sentence on appeal. He certainly could not waive a right of which he had no knowledge and the failure of counsel to advise him of it, while not amounting to "ineffective assistance" did in fact frustrate his appeal.

Thus, in the absence of a knowing and intentional waiver of a right to appeal a sentence, the Court should have granted the Section 2255 petition to enable this Court to review the conditions under which appellant was sentenced.

CONCLUSION

THE JUDGMENT OF CONVICTION SHOULD BE VACATED AND THE APPELLANT ALLOWED TO FILE A NOTICE OF APPEAL.

Dated: November 30, 1976

Respectfully submitted,

STEPHEN FLAMHAFT
Attorney for Appellant

STATE OF NEW YORK, COUNTY OF KINGS

Kris Wolbrum being duly sworn, deposes and says: deponent is not a party to the action, is over the age of 18 years and resides at: 1066 Koder Avenue, Brooklyn, New York 11230.

Affidavit of Personal Service

On November 30, 1976 at 225 Cadman Plaza East, Brooklyn, New York, 11201, deponent served the within BRIEF FOR APPELLANT (CHARLES PETERS) upon the United States Attorney, herein, by delivering a true copy thereof to him personally. Deponent knew the person so served to be the person mentioned and described as the U.S. Attorney.

Sworn to before me this 30th day of November, 1976

Kris Wolbrum

STEPHEN FLAMHAFT
Notary Public, State of New York
No. 24-6326425
Qualified in Kings County
Term expires March 30, 1978